

A **Lim Chooi Huat & Anor v Public Prosecutor**

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS
P-05-295-11 OF 2011 AND P-05-296-11 OF 2011

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ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI
SALLEH JJCA
28 JANUARY 2014

C *Criminal Procedure — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether there were serious errors committed by trial judge — Whether appellants had custody, control and possession of drugs — Whether there was clear evidence of sale or supply of drugs by appellants jointly handing it over for payment —*

D *Whether trial judge erred in his appreciation of defence case — Whether prosecution proven its beyond reasonable doubt — Whether appellate interference warranted*

E Evidence — Adverse inference — Failure to call witness — Whether prosecution's failure to call owner of motorcycle would lead to adverse inference being drawn against it — Whether prosecution withholding or suppressing evidence — Agent provocateur — Use of — Whether prosecution's case based primarily on evidence of agent provocateurs

F The police conceived an undercover operation to lure drug traffickers. For the purposes of this operation, two police officers acting as agent provocateurs (SP4 and SP6) entered into negotiations with the first appellant for the sale and purchase of heroin. The first appellant had agreed to supply the agent provocateurs 10 pounds of heroin at the price of RM8,700 per pound. The first
G appellant then directed SP4 to proceed to the first appellant's CD shop for the sale to be concluded. Upon arriving at the CD shop, SP4, who had been tasked to carry the flash money of RM87,000 for the purposes of this operation, saw the first appellant accompanied by the second appellant. When the first
H appellant enquired about the money, SP4 had handed over the flash money to him. After having checked the money, the second appellant had instructed the first appellant to deliver the drugs to SP6. The first appellant had then proceeded by motorcycle to meet SP6, while SP4 stayed with the second appellant. When SP6 met the first appellant and enquired about the drugs, the first appellant had pointed towards a bag in the carrier basket of the motorcycle.
I Upon opening the bag and finding 10 plastic bags containing powdery and granular substances, SP6 gave the rest of the police team, who were lying in wait, the pre-arranged signal to arrest the first appellant. A struggle ensued but the first appellant was arrested, followed shortly by the arrest of the second appellant. A chemistry analysis of the substances seized confirmed them to be

dangerous drugs, having a total weight of 97.1g. The two appellants were charged with common intention to commit the offence of trafficking in the drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution founded its case of trafficking on the sale of the drugs to SP4 and SP6, the agent provocateurs. In his defence, the first appellant denied having participated in the negotiations concerned with the sale of drugs and denied any knowledge as to the contents of the bag recovered from the motorcycle. Instead, the first appellant claimed that it was his friend 'Macau' who had negotiated with SP4 and that the bag containing the drugs belonged to Macau. The second appellant also denied negotiating with SP4 and having counted the flash money. He also claimed that his presence at the CD shop was a mere coincidence. The trial judge found that the appellants' defence had not raised a reasonable doubt in the prosecution's case. Consequently the appellants were convicted and sentenced to death. This was the appellants' appeal against that conviction and sentence on the grounds that the trial judge had erred in his appreciation of the defence case.

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Held, dismissing the appeals:

- (1) The first appellant's submission that he had no possession of the drugs since he had no knowledge of the contents of the bag and the second defendant's submission that mere presence could not be considered as a pre-concert to traffic were both devoid of any merit. In the instant appeal there was more than credible and cogent evidence from SP4 and SP6 to establish that the appellants acted in concert in the sale of the drugs. The preparatory act for the purpose of trafficking drugs covers a series of continuing acts commencing with the negotiation to sell heroin spearheaded by the first appellant. This was followed by SP4 being introduced to the second appellant, who checked the flash money and instructed the first appellant to deliver the drugs, and finally leading to the actual delivery of the bag of drugs by the first appellant to SP6. The facts of this case clearly showed that the first appellant had knowledge of the contents of the bag and was not a mere conduit pipe. As such, the trial judge was correct in finding that there was clear evidence of sale or supply of drugs by the first appellant for the purpose of both appellants jointly handing it over to SP6 in exchange for payment as earlier agreed (see paras 26–32).
- (2) Further, there was no iota of evidence which pointed to the involvement of 'Macau'. The trial judge had not erred in doubting the plausibility of the first appellant's defence in the light of the overwhelming evidence against him (see para 33).
- (3) The trial judge's rejection of the second appellant's defence on the basis that it was a bare denial was also justified (see para 35).
- (4) The appellants' argument that the presumption of adverse inference

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A ought to be invoked against the prosecution for its failure to call the owner of the motorcycle that the first appellant was riding when he was arrested was without merit. The prosecution had discharged its burden by calling all essential witnesses to establish its case beyond reasonable doubt. In any case there was no withholding or suppression of evidence by the prosecution since the owner of the motorcycle was offered to the defence and they could have called him as a witness, if they wished (see paras 36–40).

(5) In the fight against the drug menace, the Legislature has deemed it fit that evidence of an agent provocateur be admissible. Although in the present case, the prosecution's case was based primarily on the evidence of the agent provocateurs to prove the ingredients of the offence, the trial judge had subjected the evidence of both these witnesses to the closest scrutiny before accepting the same. As such, there was no error warranting appellate intervention (see paras 44 & 46).

(6) The prosecution had succeeded in proving all the requisite elements of trafficking. The mere fact that the police officers happened to play the role of purchasers did not detract from the fact that the appellants were trafficking in dangerous drugs. The facts and circumstances of the present appeal did not warrant the court to amend the charge to one dealing with a lesser offence. It was clear that the trial judge had considered the appellants' defence in detail before concluding that the prosecution had proved its case beyond reasonable doubt (see paras 51–52).

F [Bahasa Malaysia summary]

Polis menjalankan operasi penyamaran untuk mengumpan pengedar-pengedar dadah. Bagi tujuan operasi ini, dua pegawai polis bertindak sebagai ejen provokasi (SP4 dan SP6) telah mengadakan rundingan dengan perayu pertama untuk jual beli heroin. Perayu pertama telah bersetuju untuk membekal ejen-ejen provokasi itu 10 paun heroin pada harga RM8,700 sepaun. Perayu pertama kemudian mengarahkan SP4 untuk pergi ke kedai CD perayu pertama untuk membuat jualan itu. Setelah tiba di kedai CD itu, SP4, yang telah ditugaskan untuk membawa wang perangkap sejumlah RM87,000 bagi tujuan operasi ini, melihat perayu pertama ditemani oleh perayu kedua. Apabila perayu pertama bertanya tentang wang itu, SP4 telah memberikan wang perangkap itu kepadanya. Selepas memeriksa wang itu, perayu kedua telah mengarahkan perayu pertama menghantar dadah itu kepada SP6. Perayu pertama kemudian pergi dengan motorsikal untuk berjumpa SP6, manakala SP4 tinggal bersama perayu kedua. Apabila SP6 berjumpa perayu pertama dan bertanya tentang dadah itu, perayu pertama menuding ke arah beg di dalam bakul pembawa motorsikal itu. Setelah membuka beg itu dan menemui 10 beg plastik mengandungi bahan serbuk dan berpasir, SP6 memberi isyarat yang telah diatur terlebih dahulu kepada pasukan polis lain yang sedang menunggu itu untuk menangkap perayu pertama. Pergelutan berlaku tetapi

perayu pertama telah ditangkap, diikuti dengan tangkapan perayu kedua tidak lama kemudian. Analisa kimia ke atas bahan itu yang telah dirampas mengesahkan bahan tersebut adalah dadah berbahaya, yang berat keseluruhan adalah 97.1g. Kedua-dua perayu tersebut telah dituduh mempunyai niat bersama untuk melakukan kesalahan pengedaran dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pihak pendakwaan mendasarkan kes pengedarannya atas jualan dadah kepada SP4 dan SP6, ejen-ejen provokasi. Dalam pembelaannya, perayu pertama menafikan penglibatan dalam rundingan berkaitan jualan dadah itu dan menafikan apa-apa pengetahuan tentang kandungan beg yang ditemui daripada motorsikal itu. Sebaliknya, perayu pertama telah mendakwa bahawa kawan 'Macau'nya yang telah berunding dengan SP4 dan bahawa beg yang mengandungi dadah itu adalah milik Macau. Perayu kedua juga menafikan telah berunding dengan SP4 dan telah mengira wang perangkap itu. Dia juga mendakwa bahawa kehadirannya di kedai CD itu hanya kebetulan semata-mata. Hakim perbicaraan mendapati bahawa pembelaan perayu-perayu tidak menimbulkan keraguan munasabah dalam kes pendakwaan. Berikutan itu perayu-perayu telah disabitkan dan dijatuhkan hukuman mati. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman tersebut atas alasan bahawa hakim perbicaraan terkhilaf dalam menilai kes pembelaan.

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Diputuskan, menolak rayuan-rayuan:

- (1) Hujah perayu pertama bahawa dia tiada milikan ke atas dadah itu kerana dia tiada pengetahuan tentang kandungan beg itu dan hujah defendan kedua bahawa kewujudan semata-mata tidak boleh dianggap sebagai pra bersama untuk mengedar adalah kedua-duanya tanpa apa-apa merit. Dalam rayuan ini terdapat lebih bukti yang boleh dipercayai dan meyakinkan daripada SP4 dan SP6 untuk membuktikan bahawa perayu-perayu bertindak bersama dalam jualan dadah itu. Perbuatan persediaan bagi tujuan pengedaran dadah meliputi siri perbuatan berterusan yang bermula dengan rundingan untuk menjual heroin yang diketuai oleh tertuduh pertama. Ini diikuti oleh SP4 yang diperkenalkan kepada perayu kedua, yang diperiksa wang perangkap itu dan mengarahkan perayu pertama untuk menghantar dadah itu, dan akhirnya membawa kepada penghantaran sebenar beg dadah oleh perayu pertama kepada SP6. Fakta kes ini jelas menunjukkan bahawa perayu pertama mengetahui tentang kandungan beg itu dan bukan pengantara semata-mata. Oleh itu, hakim perbicaraan adalah betul dalam memutuskan terdapat bukti jelas jualan atau bekalan dadah oleh perayu pertama bagi tujuan kedua-dua perayu bersama menyerahkannya kepada SP6 sebagai pertukaran untuk bayaran yang telah dipersetujui sebelum ini (lihat perenggan 26–32).
- (2) Selanjutnya, tiada keterangan langsung yang menunjukkan penglibatan 'Macau'. Hakim perbicaraan tidak terkhilaf kerana meragui

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- A kemunasabahan pembelaan perayu pertama berdasarkan keterangan kukuh terhadapnya (lihat perenggan 33).
- (3) Penolakan hakim perbicaraan terhadap pembelaan perayu kedua berdasarkan ia hanya penafian biasa juga adalah berjustifikasi (lihat perenggan 35).
- B (4) Hujah perayu-perayu bahawa andaian inferens bertentangan patut digunakan terhadap pendakwaan kerana kegagalannya untuk memanggil pemilik motorsikal itu yang dibawa perayu pertama apabila dia ditangkap adalah tanpa merit. Pendakwaan telah melepaskan bebannya dengan memanggil semua saksi yang penting untuk membuktikan kesnya melampaui keraguan munasabah. Walau bagaimanapun tiada keterangan yang disembunyikan atau disekat oleh pendakwaan memandangkan pemilik motorsikal itu telah ditawarkan kepada pembelaan dan mereka patut boleh memanggilnya sebagai saksi, jika mereka mahu (lihat perenggan 36–40).
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- D (5) Dalam menangani kesalahan dadah, badan perundangan menganggap adalah sesuai bahawa keterangan ejen provokasi itu boleh diterima. Walaupun dalam kes ini, kes pendakwaan adalah berdasarkan terutamanya kepada keterangan ejen-ejen provokasi untuk membuktikan intipati kesalahan, hakim perbicaraan telah meneliti dengan terperinci keterangan kedua-dua saksi tersebut sebelum menerimanya. Oleh itu, tiada apa-apa kesilapan yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 44 & 46).
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- F (6) Pendakwaan telah berjaya membuktikan semua elemen penting pengedaran. Fakta semata-mata bahawa pegawai-pegawai polis kebetulan memainkan peranan sebagai pembeli tidak menjejaskan fakta bahawa perayu-perayu telah mengedar dadah berbahaya. Fakta dan keadaan rayuan ini tidak mewajarkan mahkamah untuk meminda pertuduhan itu kepada suatu kesalahan yang lebih ringan. Adalah jelas bahawa hakim perbicaraan telah mempertimbangkan pembelaan perayu secara terperinci sebelum membuat kesimpulan bahawa pendakwaan telah berjaya untuk membuktikan kesnya melampaui keraguan yang munasabah (lihat perenggan 51–52).]
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Notes

For cases on failure to call witness, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 247–281.

For cases on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1929–1932.

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Cases referred to

(1) *Namasiyiam* (2) *Rajidran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v PP* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, SC (refd)

- Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411, HC (refd) **A**
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Nottingham City Council v Amin [2000] 2 All ER 946, QBD (refd)
Ong Chin Keat Jeffrey v PP [2004] 4 SLR 483, HC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd) **B**
PP v Mohamed Halipah [1982] 1 MLJ 155; [1981] CLJ 238 (Rep); [1981] CLJ 92 (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)
R v Looseley [2001] 4 All ER 897, HL (refd) **C**
R v Mack [1988] 44 SCC (3rd) 513, SC (refd)
R v Sang [1979] 2 All ER 1222, HL (refd)
Raghubir Singh v State of UP AIR 1971 SC 2156, SC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Suresh & Anor v State of UP 2001 (3) SCC 673, SC (refd) **D**
Tee Thian See v PP [1996] 3 MLJ 209; [1997] 5 CLJ 654, HC (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)
Legislation referred to **E**
 Dangerous Drugs Act 1952 s 39B(1)(a), (2), 40A(1), (2)
 Evidence Act 1950 s 114(g)
 Indian Penal Code [IN] s 34
 Penal Code s 34 **F**
Appeal from: Criminal Trial No 45–10 of 2011 (High Court, Pulau Pinang)
Salim bin Bashir Bhaskaran (Salim Bashir Ruswiza & Co) in Appeal P-05–295–11 of 2011 for the appellant.
Kitson Foong (Ahmad Zaidi & Partners) in Appeal P-05–296–11 of 2011 for the appellant. **G**
Aslinda Abad (Deputy Public Prosecutor, Attorney General's Chambers) in Appeal P-05–295–11 of 2011 and P-05–296–11 of 2011 for the respondent.
Zawawi Salleh JCA (delivering judgment of the court): **H**

INTRODUCTION

[1] This appeal arises out of the judgment of the Penang High Court, in which the court had convicted both the appellants under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') and sentenced them to the mandatory death sentences prescribed under s 39B(2) of the DDA 1952. **I**

A [2] Being aggrieved by the said impugned convictions and sentences, the appellants have now appealed to this court.

B [3] We have heard learned counsel for the appellants and learned deputy public prosecutor at some length. We have gone through the records available before us. In our view, the learned trial judge's decision does not suffer from any patent legal infirmity requiring interference by this court. Accordingly, we unanimously dismissed the appeals and affirmed the convictions and sentences passed by the High Court.

C [4] We now give the reasons for our decision.

THE CHARGE

D [5] The appellants were charged and tried with the following offence:

E Bahawa kamu bersama-sama pada 14 Mei 2010, jam lebih kurang 3.00 petang di hadapan TESCO, Jalan Tengku Kudin 1, Gelugor, di dalam daerah Timur Laut, di dalam negeri Pulau Pinang, dengan niat bersama memperedarkan dadah berbahaya sejumlah berat 97.10g (27.4 gram Heroin dan 69.7g Monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

FACTS OF THE CASE

F [6] The facts giving rise to this appeal have been fully set out in the judgment of the learned trial judge. Our narration of them, here, will therefore be skeletal in nature. Whenever necessary in this judgment some of the facts relating to specific issues will be examined in greater detail.

G [7] The police had set up a task force to conduct drug suppression operation. This is an undercover operation by police officers to arrest unsuspecting drug traffickers. For the purpose of this operation, Sjn Mohd Redzuan Yap (SP4) acted as the first agent provocateur and he was partnered with Kpl Mohd Iskandar, who was tasked to carry the flash money in the amount of RM87,000. The second agent provocateur, Kpl Govindasamy (SP6), was tasked to accept the delivery of drugs at a different location. SP6 was partnered with L/Kpl Than.

I [8] On 12 May 2010, at about 5.30pm, SP4, L/kpl Than and an informer went to Restaurant Aliyar to meet up with the first appellant (nicknamed 'Apai'). The informer introduced the first appellant to SP4, who nicknamed himself as Topoi'.

- [9] SP4 and the first appellant bargained for the sale and purchase of heroin. The first appellant agreed to supply 10 pounds of heroin, at the price of RM8,700 for every pound. The informer and L/Kpl Than did not participate in the negotiation. A
- [10] On 14 May 2010, the first appellant had called SP4 twice to enquire about the proposed purchase. During the second phone call, SP4 also spoke to one 'Ah Hoe', who also enquired about the proposed purchase, and instructed SP4 to proceed to the first appellant's CD shop at Jalan Macallum. B
- [11] Upon arriving at the CD shop, SP4 saw the first appellant was accompanied by the second appellant, who was identified as 'Ah Hoe'. The first appellant enquired about the money. The flash money, contained in a plastic bag, was handed over to the first appellant who passed the bag over to the second appellant. Having counted the money, the second appellant placed the plastic bag inside a drawer. C
- [12] The second appellant then made a call to an unknown person informing that the money was adequate. The second appellant then instructed the first appellant to fetch and deliver the drugs to SP6. SP4 had given the first appellant a mobile number in order for him to contact SP6. D
- [13] Both SP4 and the second appellant then went to Restaurant Seven Star, located next to the CD shop. Earlier, SP4 took the plastic bag containing the flash money that was put in the drawer by the second appellant and promised to give the money back once the drugs were delivered. E
- [14] At about 2.23pm, SP6 received a phone call from the first appellant enquiring about his whereabouts. SP6 informed the first appellant that he was at Restaurant Pelita, Tesco, Gelugor. While on a lookout, L/Kpl Than saw the first appellant on a motorcycle (PFR 6753) stationed at a nearby road. UKpl Than then called out to the first appellant and waved his hand. F
- [15] SP6 walked up to the first appellant and enquired about the drugs. The first appellant pointed towards the bag in the carrier basket of the motorcycle. SP6 opened the bag and saw several translucent plastic bags containing powdery and granular substances believed to be heroin. SP6 then scratched his head several times, a pre-arranged signal to arrest the first appellant. G
- [16] Inspector Hilmi (SP8) rushed forward to arrest the first appellant and a struggle ensued. SP8 identified himself as a police officer and examined the bag. He found ten translucent plastic bags containing powdery and granular substances believed to be heroin. The drugs were seized and chemistry analysis I

- A confirmed them to be dangerous drugs, having a total weight of 97.1g (27.4g of heroin and 69.7g of monoacetylmorphines).

- [17] Inspector Gan (SP7), received a call from SP8 at about 3.25pm informing him of the arrest of the first appellant and the seizure of the drugs.
B SP7 then went to Restaurant Seven Star and arrested the second appellant.

THE DEFENCE CASE

- C [18] The appellants presented an entire different story. The first appellant denied having participated in the negotiations concerned with the sale of drugs in this case. It was his friend 'Macau' who spoke to SP4 at Restaurant Aliyar on the first occasion. The first appellant asserted that the bag containing the offending drugs belonged to 'Macau'. He denied any knowledge as to the contents of the bag.
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- [19] According to the first appellant, he went to Tesco to meet up with Macau's friends on Macau's request. He was supposed to guide them back to Jalan Macallum as Macau's friends were not familiar with the roads in Penang.
E He rode Macau's motorcycle because Macau told him to do so as Macau's friends recognised the registration number. The bag containing the offending drugs was already in the carrier basket.

- [20] The second appellant's defence was that he did not negotiate with SP4.
F He denied having received and counted the flash money. He had no physical possession of the offending drugs. His presence at the CD shop and the restaurant was a mere coincident.

- [21] Both appellants did not deny the presence of SP4 at the CD shop.
G However, they maintained that the first appellant had refused to accept a parcel from SP4, to be delivered to 'Macau'.

THE GROUNDS OF APPEAL

- H [22] The appellants are now before us, urging reversal of the decision of the learned trial judge on the following grounds:

- (a) that the first appellant has no knowledge as to the contents of the bag placed in the carrier of the motorcycle;
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(b) that the second appellant has no physical possession of the bag which contained the offending drugs;
(c) that the non-calling of one Ng Kim Fuan (owner of motorcycle) attracts the invocation of adverse inference against the prosecution's case; and

(d) entrapment.

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Ground (a) and (b): Custody control and possession of the drugs

[23] We will deal with grounds (a) and (b) of the appeal together.

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[24] Learned counsel for the first appellant contended that his client can hardly be said to be in possession of the offending drugs since he has no knowledge of the contents of the bag.

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[25] In respect of the second appellant, learned counsel contended that the trial judge erred in the finding of second appellant's culpability through SP4's evidence that:

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- (a) the second appellant was present when SP4 delivered the money;
- (b) the second appellant had made a telephone call through his mobile phone; and
- (c) he instructed the first appellant to deliver the drugs to SP6.

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[26] It was the second appellant's contention that mere presence could not be considered as pre-concert to traffic the said drug without any supporting evidence. Further, there was no finger prints lifted from the flash money to establish that the second appellant had counted the money.

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[27] In response, learned deputy public prosecutor submitted that the appellants were charged with common intention to commit the offence. And that the evidence adduced must be considered as a whole including the overwhelming evidence that the appellants acted together to effect the sale of drugs to SP4 and SP6.

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[28] With respect, the submission of learned counsel for the appellants is devoid of any merit. It is essential to bear in mind that the prosecution founded its case of trafficking on the sale of dangerous drugs to SP4 and SP6, the agent provocateurs. The definition of 'trafficking' in the Act is wide and includes not only carrying, keeping and concealing, but also buying or selling (see *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197).

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[29] The principles of law on common intention under s 34 of the Penal Code had been clearly stated in the Supreme Court case of (1) *Namasiyiam* (2) *Rajidran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241. Syed Agil Barakbah SCJ, in his judgment, had this to say:

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- A** In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
- B** Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence or a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by JK Soonavala pp 188 to 193).
- C**
- D** [30] In the same vein, the Indian Supreme Court in *Suresh & Anor v State of UP* 2001 (3) SCC 673, had the following to state pertaining to s 34 of the Indian Penal Code which is in pari materia with our s 34:
- E** Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The s gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.
- F**
- G**
- H** The dominant feature for attracting s 34 of the Indian Penal Code (hereinafter referred to as 'the Code') is the element of participation in absence resulting in the ultimate 'criminal act'. The 'act' referred to in latter part of s 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The s does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of s 34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word 'act' used in s 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present
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at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under s 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Shatrughan Patar & Ors v Emperor* [AIR 1919 Pat 111] held that it is only when a court with some certainty hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that s 34 may be applied.

(see also *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37.)

[31] In the instant appeal, there is more than credible and cogent evidence from SP4 and SP6 to establish that the appellants acted in concert in the sale of the drugs. The preparatory act for the purpose of trafficking drugs covers a series of continuing acts. The negotiation to sell heroin on the first occasion was spearheaded by the first appellant. SP 4 was later introduced to the second appellant. The second appellant had checked the money, made a phone call to an unknown person informing that the money was adequate, then instructed the first appellant to fetch and deliver the drugs. The first appellant met up with SP6 and pointed towards the bag in the carrier basket when SP6 enquired about the drugs.

[32] On the facts and circumstances of this case, it clearly showed that the first appellant had knowledge of the contents of the bag and he was not a mere conduit pipe. Therefore, we are in entire agreement with the learned trial judge in finding that there was clear evidence of sale or supply of drugs by the first appellant for the purpose of both appellants jointly handing it over to SP6 in exchange for payment as earlier agreed.

[33] There was no iota of evidence which points to the involvement of 'Macau'. If indeed 'Macau' was the real trafficker of the offending drugs, it would be unreasonable for the first appellant not to have revealed 'Macau's' name to the police at the earliest opportunity, as it would have absolve him from being charged with the offence. The learned judge had explained why he was not convinced with the first appellant's defence, as he had doubted its plausibility. We are of the view that His Lordship did not err in making such a finding in the light of the overwhelming evidence against the first appellant.

[34] We also find ourselves unable to agree with learned counsel's submission that lack of fingerprinting evidence would cast a doubt to the prosecutions' case. Fingerprint evidence would be of great significance when the culprit's identity is in question. In the present case, the alleged trafficking was in the

A form of sale and there is evidence showing the identities of the alleged offenders and the sale transaction. Therefore, fingerprint evidence on the flash money assumes little significance.

B [35] With regard to the second appellant's defence, the learned trial judge had rejected it and deemed it as bare denial. On the totality of the evidence before the court, we find the learned trial judge's decision on the second appellant's defence was justified. We have no reason to disturb his finding.

C *Ground (c): Presumption of adverse inference*

D [36] Learned counsel for the first appellant mounted an attack on the failure of the prosecution to call the owner of the motorcycle, thereby occasioning the application of the presumption of adverse inference against the prosecution's case.

E [37] Learned deputy public prosecutor admitted that statement was taken from the motorcycle owner. However, she argued that the prosecution has a discretion whether or not to call a particular witness as all essential witnesses to unfolding the narrative on which the prosecution is based were called. Therefore, the discretion had been exercised in a manner in which the appellants suffered no prejudice or unfairness. She further argued that the presumption does not arise in the present case as there was no withholding of evidence and Ng Kim Fuan was offered to the defence.

G [38] A number of witnesses may have observed a criminal transaction and have their statements taken by the police. However, it is not necessary for the prosecution to produce each and every one of them. All that is required from the prosecution is to produce witnesses whose evidence can be believed so as to prove the case beyond reasonable doubt. It is clear law that adverse inference under illustration (g) of s 114 Evidence Act can only be drawn if there is withholding or suppression of evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 (FC)).

H [39] In *Raghubir Singh v State of UP* AIR 1971 SC 2156, the Indian Supreme Court had this to say:

I Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. The appellant's Counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was

deliberately kept back by the prosecution. Incidentally we may point out that the accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version.

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[40] In our considered view, counsel's arguments are without merit. We have examined the evidence with care and we agreed with learned deputy public prosecutor that the prosecution had discharged its burden by calling all essential witnesses to establish its case beyond reasonable doubt. Furthermore, Ng Kim Fuan was offered to the defence at the close of prosecution's case. The defence could have called him if they so wished.

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Ground (d): Entrapment

[41] Learned counsel for the first appellant submitted that since this case was based on a trap set up by the police, the court must be cautious with the evidence adduced by the prosecution. In support of his submission, learned counsel cited the case of *R v Looseley* [2001] 4 All ER 897, in which Lord Nicholls of Birkenhead stated as follows:

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Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.

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[42] Learned counsel submitted that the underlying principle gleaned from the foregoing extract is that the court may exercise its discretionary powers when confronted with the evidence of an agent provocateur. The court may exclude the evidence, or grant a stay of proceedings to prevent an abuse of process.

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[43] Before we consider the merits or otherwise of the appellants' submission, we must reiterate that the local position on entrapment is still consistent with the decision of *R v Sang* [1979] 2 All ER 1222, and it is not a valid defence to a charge. Lord Diplock said (at p 437) that *The court is not concerned with how the evidence was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent of provocateur.*

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A [44] Our answer to the counsel's submission is, it is common for the police to employ the use of agent provocateurs due to difficulty faced in detecting the crime. It has been proven to be effective in unveiling the identities of drug traffickers and having them out of obscurity. In the fight against the drug menace, the Legislature has deemed it fit that evidence of an agent provocateur be admissible. Section 40A(1) of the DDA 1952 provides that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence if the attempt to abet or abetment was for the sole purpose of securing evidence against such person. It is an established principle of law that an agent provocateur's evidence requires no corroboration and that an accused person can be convicted on the uncorroborated evidence of the agent provocateur if the court accepts the truth of the evidence (see *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17, (1) *Namasiyiam* (2) *Rajidran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, *Tee Thian See v Public Prosecutor* [1996] 3 MLJ 209; [1997] 5 CLJ 654 and *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155; [1981] CLJ 238 (Rep); [1981] CLJ 92).

E [45] Section 40A(2) of the DDA 1952 states that *any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial*. The subs denotes that the court has no discretion to refuse to admit evidence by an agent provocateur.

G [46] We are mindful that in the present case, the prosecution's case was based primarily on the evidence of SP4 and SP6 to prove the ingredients of the offence. The trial judge had indeed subjected the evidence of both witnesses to the closest scrutiny before accepting them. Therefore, there was no error warranting appellate intervention into the learned trial judge's finding.

H [47] To our mind, even if the principles espoused in the English case above is applicable in the local context, it does not render any assistance to the appellants. The court in *Looseley* observed that if the circumstances showed that the police had overstepped the boundary by holding out excessive or unfair inducement, the court may stay the proceedings to prevent abuse of process. After a careful reading of the appeal record, we find that the policemen's conduct could not be regarded as objectionable or excessive inducement.

I [48] In this regard, it will be instructive to refer the following passage of the case of *Nottingham City Council v Amin* [2000] 2 All ER 946, cited in *Looseley*.

It has been recognised that the law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else.

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[49] In *R v Mack* [1988] 44 SCC (3rd) 513 (SCC), the Supreme Court of Canada stated that with respect to the crime of drug trafficking, the state must be given substantial leeway. This offence *is not one which lends itself to the traditional of police investigation*. The court added that it is a *crime of enormous social consequences which causes a great deal of harm in society generally*. The court concluded that *'this factor alone is very critical'* (at p 560) (see also *Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR 411).

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[50] In his last attempt to clutch at the elusive legal straws, learned counsel argued that the entrapment carried out by the police officers constituted a reason for the court to exercise its discretion to convict them on a lesser offence (ie possession) instead of that arising out of the entrapment (ie trafficking). The appellant cited the case of *Ong Chin Keat Jeffrey v Public Prosecutor* [2004] 4 SLR 483 in support of his arguments.

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[51] We took the view that the first appellant's argument in this regard was without merit. As we have alluded to earlier, the prosecution had succeeded in proving all the requisite elements of trafficking. The mere fact that the police officers happened to play the role of purchasers did not detract from the fact that the appellants were trafficking in dangerous drugs. The facts and circumstances of the present appeal does not warrant the court to amend the charge to one dealing with a lesser offence.

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CONCLUSION

[52] After having read the appeal record, we are satisfied that no miscarriage of justice was occasioned in this case. The appellants had every opportunity to raise a reasonable doubt in the prosecution's case. Further, the learned trial judge did consider the appellants' defence in detail at the end of which, His Lordship was satisfied that the prosecution had proved its case beyond reasonable doubt.

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A [53] In the result, the appeals were dismissed and the convictions and sentences imposed by the learned trial judge affirmed.

Appeals dismissed.

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Reported by Kohila Nesan

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